

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2009-404-005278

BETWEEN VENTURE FINANCIAL SERVICES (NZ)
LIMITED
Appellant

AND PAULA LAUMAPE TUKULUA
Respondent

Hearing: 10 December 2009

Appearances: G Brown-Haysom for Appellant
N C King for Respondent

Judgment: 18 December 2009 at 11:30 am

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 18 December 2009 at 11:30 am
pursuant to R 11.5 of the High Court Rules.

Registrar / Deputy Registrar
Date.....

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[1] The appellant, Venture Financial Services (New Zealand) Limited, appeals a decision of Andree Wiltens DCJ 23 July 2009 dismissing its claim against the respondent, Mr Tukulua.

[2] In October 2008 VFS commenced proceedings against Mr Tukulua for the outstanding balance owing under a loan agreement between Mr Tukulua and Provincial Finance Limited (the loan having since been purchased from Provincial Finance by the VFS). Mr Tukulua filed a statement of defence and also corresponded directly with VFS, explaining that he had been asked to sign the loan agreement by his then employer, Lopiti Faupula Aloua, and his employer's son, Lopiti Heimuli Aloua. VFS' solicitor, Mr Brown-Haysom, advised Mr Tukulua about the third-party procedure but Mr Tukulua did not make a formal application.

[3] The proceeding was set down for a two-hour defended fixture on 23 July 2009. Mr Brown-Haysom appeared for VFS and had a witness, whom he intended to call. Mr Tukulua appeared in person with a McKenzie friend. Also in court were Mr Aloua senior and Mr Aloua junior. Mr Aloua senior and Mr Aloua junior had made a declaration (undated) which was tendered to the Court. In the declaration they claimed to be the true liable parties under the sale and purchase agreement because the vehicle was purchased for Mr Aloua junior but that the finance company would not accept him as a purchaser because he was under age and Mr Tukulua was brought into the arrangement as purchaser. They also said that Mr Tukulua did not know of the arrangement because of his poor English and did not understand the documents that he was signing.

[4] Mr Brown-Haysom explained that following introductions the Judge addressed Mr Tukulua, Mr Aloua senior and Mr Aloua junior directly. He then asked Mr Brown-Haysom whether VFS consented to Mr Aloua junior being joined as a defendant. Mr Brown-Haysom indicated his consent. The Judge immediately made an order joining Mr Aloua junior as second defendant. Without enquiring as to any other aspect of the case the Judge then entered judgment by default against Mr Aloua and dismissed the claim against Mr Tukulua. He made no order for costs. No reasons were given and, before Mr Brown-Haysom could object or seek to be heard, the Judge terminated the hearing and left the Court.

[5] Mr Brown-Haysom submitted in support of the appeal that, although there had been discussion and agreement about the joinder of Mr Aloua, there was never any discussion about the proceeding against Mr Tukulua. Mr Brown-Haysom was not asked whether he consented to the claim against Mr Tukulua being dismissed. He was not invited to adduce evidence, nor to make submissions. Mr Brown-Haysom submitted that the Judge failed to deal with the issue before him (the plaintiff's claim) and, if he had reasons for dismissing the plaintiff's claim, he failed to record any of them. VFS seeks to have the order striking out the claim against Mr Tukulua dismissed and the matter remitted to the District Court for a hearing.

[6] Mr King, for Mr Tukulua, submitted that the orders that the Judge made were open to him and that, on the available information, they were proper orders. In particular, Mr King referred to the fact that Mr Tukulua had limited English, that there was no evidence that he understood what he was signing, that there had been a delay of five years from the accrual of the cause of action until proceedings were issued, that the amount claimed on filing had increased significantly due to penalty interest, and that another defendant had been joined who admitted liability for the debt.

[7] The facts before me suggest that there are a number of important aspects that should have been explored in relation to the claim against Mr Tukulua. These include the question whether he actually understood the nature of the document he was signing, whether proper disclosure had been given to him under the Credit Contracts Act 1981, the true extent of his understanding of English and whether it was he who made payments pursuant to the agreement. However, whilst some of the issues raised by Mr King might ultimately have merit, the Judge had no sworn evidence from any party on which he could have made a decision. He had only the declaration from Mr Aloua senior and his son, together with the informal discussion that occurred prior to entering judgment. The Judge was, quite simply, not in a position to make a decision other than the decision to join Mr Aloua, that order being made by consent.

[8] Even if the Judge had had before him sufficient admissible evidence on which to make a decision, his failure to give reasons for dismissing the claim against Mr Tukulua makes it impossible to identify the basis for the decision. There is no

general requirement for judges to give reasons for their decisions. However, the Court of Appeal has made it clear that it is desirable to do so and that failure to do so might jeopardise the decision on appeal because a potential appellant might be seen to be unduly prejudiced or the inference might be left open that there were no adequate reasons to support the decision.¹

[9] On the face of it Mr Tukulua had signed the agreement and failed to pay the outstanding amount under it. It is plain that there was a more complicated situation lying behind the face of the agreement. But without exploring that by way of hearing evidence and submissions there was insufficient basis for dismissing the claim. The appeal is therefore allowed. The order dismissing the claim against Mr Tukulua is quashed. The matter is remitted to the District Court for a hearing.

P Courtney J

¹ *R v Awatere* [1982] 1 NZLR 644; *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 546